Supreme Court, U. S.
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76-1146

IN THE

Supreme Court of the United States

October Term, 1976
No.

B & E Paving Company and Joseph Bartone, Partner in B & E Paving Company,

Petitioners,

v.

United States of America and Francis T. Brady, Special Agent of the Internal Revenue Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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Francis T. Brady, Special Agent
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Respondents.

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Second Circuit

The Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the above case on November 22, 1976.

OPINIONS BELOW

The United States District Court

rendered no separate opinion, but there were oral findings of said Court, as set forth in the transcript of the hearings conducted in this case. The opinion of the Court of Appeals for the Second Circuit (R. ....) is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered November 22, 1976 (R. ....) and a copy thereof is appended to this petition in the Appendix at p. 14. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented are:

1. Whether a two man partnership organized under the laws of the State of New York by the filing of a "Business Certificate for Partners", not having a written partnership agreement, bylaws or constitution, concededly an "artificial entity", per se has such institutional characteristics as to make it a "collective entity" so that its books and records would not be subject to the Fifth Amendment privilege of one of its partners having exclusive ownership, possession and control of same after the dissolution and termination of the partnership and its business?"

2. "Can a partner of a two man partnership organized under the laws of the State of New York, which partner obtained ownership, possession and control of the books and records of said partnership as part of the dissolution and wind-up of said partnership maintain a personal, nonrepresentative interest in such books and records sufficient to claim the Fifth Amendment privilege as to said books and records on the service of an Internal Revenue Service Summons for the examination of said books and records?"

CONSTITUTION, STATUTES AND FEDERAL RULES, INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part as follows:

"No person shall.... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

28 USC 7602 provides as follows:
"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the lia-

bility of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized ——

(1) To examine any books, papers, records, or other date which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

28 USC 1254(1) provides as follows: "Cases in the courts of appeals may be reviewed by the Supreme Court by the

following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Rule 41(b) of the Federal Rules of Appellate Procedure provides as follows:

"A stay of the mandate pending application to the Supreme Court for a writ of certiorari may be granted upon motion reasonable notice of which shall be given to all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the period of the stay there is filed with the clerk of the court of appeals a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall con- until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately. A bond or other security may be required as a condition to the grant or continuance of a stay of the mandate."

STATEMENT

This case involves the enforcement of Internal Revenue Summonses issued to

the Petitioners pursuant to the authority granted the Internal Revenue Service by 28USC 7602. The basic facts, which are not in dispute, are as follows:

In 1971 Joseph Bartone (Petitioner herein) and Henry Esposito entered into a partnership, B & E Paving Company (also a Petitioner herein). The partners were the sole operators of the partnership. They maintained day to day supervision of its operations, were the only signatories on the partnership's checking account, and were familiar with the accounting and bookkeeping procedures of the partnership. Partnership income and job orders were produced through the exclusive efforts of the partnership. The partnership employed only a part-time bookkeeper, one outside salesman, and a small construction crew. On occasion, Bartone's former sister-in-law helped with the payroll. The bookkeeper employed by the partnership posted cash receipts and disbursements, prepared payroll tax returns, partnership returns and the individual partner's individual returns. The books and records were generally kept at the home of petitioner's partner, but on occasions petitioner Joseph Bartone, carried the payroll book or checkbook in his car and would deliver the books and records to the bookkeeper.

The partnership was dissolved in 1972 ( ). Upon the dissolution of B & E Paving Company, Petitioner Bartone assumed all outstanding debts and liabilities of the partnership ( ). In consideration of this assumption, Bartone obtained personal ownership, possession and control of all partnership books and records ( ). There was no investigation of B & E Paving or Joseph Bartone in progress at that time.

In May, 1975, Special Agent Francis T. Brady was assigned to investigate the tax liabilities of Joseph Bartone (respondent). (R.) On August 11, 1975, Brady issued a summons to respondent, as a partner in B & E Paving Company, requesting (R.):

> All books, records, documents (sic) and papers in * * * (his) possession or control belonging to B & E Paving Co., which will enable a representative of the Internal Revenue Service to verify the accuracy of the Form 1065 (Partnership) return filed by B & E Paving Co., for the year

1972 * * *.

In November, 1975 the Government filed a "Petition to Enforce the Internal Revenue Summons" ( ). An Order to show cause issued on January 9, 1976 from the District Court for the Eastern District of New York ( ) as to why the Summons should not be enforced. It was pursuant to that Order that the hearings below were held.

In the District Court, Petitioners, defended against the enforcement of the summons on two grounds: (1) that the summons was issued in bad faith for an improper purpose and after recommendation for criminal prosecution, and (2) that enforcement of the summons would violate petitioner, Joseph Bartone's, Fifth Amendment privilege against self-incrimination to refuse to produce the documents sought.

At the hearing on these issues, the special agent testified that (R.) he had been assigned to this case to determine respondent's tax liability, that (R.) the records were necessary to determine that liability, and that ( ) he had reached no conclusion regarding whether to recommend criminal prosecution. Further, upon the assurance by Assistant U.S. Attorney, John R. Tjaden, to the District Court that no criminal recommendation had been made

( ) and that there was no correspondence or cummunication between Mr. Brady and any other officer or employee of the Internal Revenue Service or of the Department of Justice bearing upon the criminal liability of Joseph Bartone, the Court determined that no recommendation for prosecution had yet been made and that the summons was issued in good faith. Accordingly, holding that B & E Paving Co. was an artificial entity, owned substantial property, paid bills, entered into purchase agreements and took loans, the District Court on March 11, 1976 ordered enforcement of the summons ( ). On May 7, 1976, respondent filed a notice of appeal ( ). Jurisdiction was conferred on the Court of Appeals by 28 U.S.C. 1291.

The aforesaid appeal was heard by the Court of Appeals for the Second Circuit on November 8, 1976 and Judgment of said Court was made and entered November 22, 1976 affirming the order of the U.S. District Court.

The decision of the Court of Appeals dealt only briefly with the issue of the Petitioner's assertion of his Fifth Amendment privilege, referring to the holding of the District Court that the books and records of B & E Paving Co. were created by an accountant for an "artificial entity". The Court of Ap-

peals determined that the case was controlled by this Court's decision in Bellis v. United States, 417US 85, 89 in this Court's holding that an individual cannot rely upon the privilege against self-incrimination to avoid producing records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally. On the issue raised on appeal that the dissolution and wind-up of B & E Paving Co. and Mr. Bartone's obtaining exclusive possession and control of the partnership's assets, books and records gave Mr. Bartone personal, nonrepresentative possession and control of said books and records sufficient to afford him the right to assert his Fifth Amendment privilege as to same, the Court of Appeals referred exclusively to this Court's decision in Bellis in denying Petitioner's contentions.

On December 6, 1976, Petitioners moved in the Court of Appeals for a stay of issuance of mandate pending this application for a writ of certiorari. Said motion was granted on January 17, 1977 subject to the provisions of Federal Rules of Appellate Procedure 41(b).

REASONS FOR GRANTING THE WRIT

The original March 11, 1976 decision

below should be reviewed because it erroneously interprets the Fifth Amendment to the Constitution of the United States so as to improperly deny to an individual his right to assert his rights and privileges under said Fifth Amendment to resist compelled production of books and records of a former partnership in his sole and exclusive possession and control. The decision below is in conflict with the decisions of this Court in U.S. v. White, 322 U.S. 694, Boyd v. U.S., 116 U.S. 616, 29L. Ed 746, 6 S.Ct. 524 and Bellis v. U.S., supra, and if not so in conflict, the issues presented in this case are of such far-reaching importance and are so unsettled that for the sake of certainty of constitutional rights among a large segment of the business community, such issue must be faced. In either event, this Court should grant review.

1. As indicated by Question 1, it is our belief the Court below has erroneously interpreted White v. U.S. and Bellis v. U.S. to the extent that it holds any partnership, concededly an "artificial entity" is by its nature the "collective entity" referred to in White v. U.S. and Bellis v. U.S. such as to per se prevent any individual partner's assertion of his Fifth Amendment privilege as to the books and records of said partnership.

We concede any partnership, even the smallest one, which operates as such under the laws of the State of New York is an "artificial entity" to some extent, since it can hold property, sue and be sued in its own name. A partnership, however, also has aspects involving the personal interests of its members. Each partner can bind the other in the business dealings of the partnership; the death of any one partner terminates the partnership and each partner is a principal and each is an agent for the other. The test, as stated in U.S. v. White; supra, at p. 701, is not a mechanical one but one taking into consideration all the facts of the type of enterprise under examination. ( ).

2. This Court's decision in Bellis v. U.S. recognizes that the bare fact a general partnership exists does not mean it per se becomes a collective entity (417 U.S. at p. 93). If this were not the case, the Court's reference to informally organized partnerships (417 at p. 95), family partnerships, (417 at p. 101), the cases of In re Subpoena Duces Tecum, 81 F. Supp. 418 (N.D. Ca 1 1948) and U.S. v. Slutsky, 352 F. Supp. 1105 (S.D.N.Y. 1972) would have no meaning (417 U.S. at p. 101).

It is this distinction which the Court below has failed to consider, or

having considered it, has erroneously disregarded.

3. Other cases to some extent similar insofar as they relate to partnership records have been decided by other circuits against assertion of the Fifth Amendment privilege of individual partners. Mahady v. Mahady, 512 F 2d 521 (CA-3, 1975). There are, we believe, a great number of unlitigated summonses for books and records of small partnerships not being contested by individual partners because of the erroneous belief such litigation would be useless. To such extent, citizens are forfeiting their constitutional rights without cause by submitting to compelled self-incrimination.

4. In the words of this Court's opinion in White v. U.S., the privilege raised here is one more in line with "the constitutional guarantee against compulsory self-disclosure" designed to protect individual civil liberties and is not sought "to protect economic or other interests" of such "impersonal" organizations" so as to nullify appropriate governmental regulations."

CONCLUSION

For the reasons set forth above, it

is respectfully submitted that this petition for a writ of certiorari should be granted.

William J. Werner

Stephen C. Silverberg
Of Counsel

U.S. and Francis T. Brady, Special Agent of the Internal Revenue Service, PETITIONERS-APPELLEES v. B & E PAVING COMPANY and Joseph Bartone, Partner in B & E Paving Company, RESPONDENTS-APPELLANTS. U.S. Court of Appeals, Second Circuit, No. 76-6082, Nov. 22, 1976.

Appeal from the United States District Court for the Eastern District of New York.

Before HAYS, ANDERSON, TIMBERS, Circuit Judges.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the ground that the oral findings by the trial court, as set forth in the transcript, which said that B & E Paving was an "artificial entity" and that the partnership records in question were created by an accountant for the partnership and not an individual partner, are not "clearly erroneous." F.R.C.P. 52(a).

The case is, therefore, controlled by Bellis v. United States, 417 U.S. 85, 89 (1974), which declares that "an individual cannot rely upon the privilege (against self-incrimination) to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." Bellis likewise governs appellant's contention that the dissolution of B & E Paving transformed these records into the personal property of Mr. Bartone, 417 U.S. at 99-100.

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B & E PAVING COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The question presented by the petition is whether the decision below correctly held that petitioner Bartone could not claim his Fifth Amendment privilege against compulsory self-incrimination as a ground for refusing to produce financial records of his partnership that were sought by an Internal Revenue Service summons.

The pertinent facts are as follows: During the course of an investigation of Bartone's income tax liabilities for 1972, Special Agent Francis T. Brady issued a summons to Bartone, a partner in B & E Paving Company, requesting the financial records of the partnership (R. A-5, A-30, A-32).[1] In this action to enforce the summons

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[1] "R." refers to the record appendix filed in the court of appeals.

brought by the government in the United States District Court for the Eastern District of New York, the district court found that the summons had been issued in good faith and prior to a recommendation for criminal prosecution, and that Bartone could not claim his Fifth Amendment privilege as a bar to the production of the partnership records (R. A-92, A-98 to A-99, A-101). The court of appeals affirmed on the authority of this Court's decision in *Bellis* v. *United States*, 417 U.S. 85 (Pet. App. A1-A2).

The court of appeals correctly held that this case is controlled by *Bellis*, in which the Court stated that "an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally." 417 U.S. at 89. Accord: *Fisher* v. *United States*, 425 U.S. 391, 408. Here, the district court found (R. A-97) that B & E Paving Company was a formally organized partnership and rejected petitioners' characterization of the partnership as an informal association or a temporary arrangement for a few short-term projects. Cf. *Bellis* v. *United States*, *supra*, 417 U.S. at 95.[2]

Finally, petitioners suggest (Pet. 3, 7) that the fact that the partnership had been dissolved and that Bartone had obtained possession and control of all partnership books

[2]Petitioners' reliance upon *In re Subpoena Duces Tecum*, 81 F. Supp. 418 (N.D. Cal.), and *United States* v. *Slutsky*, 352 F. Supp. 1105 (S.D. N.Y.), is therefore misplaced. With respect to those cases, the Court in *Bellis* stated (417 U.S. at 101) that "[t]his might be a different case if it involved a small family partnership * * * or * * * some other pre-existing relationship of confidentiality among the partners."

and records somehow gave Bartone a greater claim to Fifth Amendment protection. But the Court in *Bellis* made it clear that the dissolution of a partnership does not afford a partner any greater claim to the privilege than he would have if the partnership were still in existence (see 417 U.S. at 96, n. 3).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1977.